

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**INTERNATIONAL CO-PROSECUTOR'S REPLY TO AO AN'S LETTER  
REGARDING HER IMMEDIATE APPEAL OF THE TRIAL CHAMBER'S  
EFFECTIVE TERMINATION OF CASE 004/2**

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## I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) hereby replies to Ao An’s letter regarding her immediate appeal of the Trial Chamber’s effective termination of Case 004/2.<sup>1</sup> For the reasons discussed below, the ICP requests that Supreme Court Chamber (“SCC”) dismiss the arguments contained in Ao An’s letter and grant the relief requested in the ICP’s Appeal.<sup>2</sup>

## II. REPLY

2. As a preliminary issue, Ao An responds to the ICP’s Appeal in the form of a letter to the SCC Judges rather than a formal pleading, claiming it would be “inappropriate” to comply with the Practice Direction because the SCC is not seised of the case.<sup>3</sup> Even parties contesting personal jurisdiction—which goes to the very heart of whether a Chamber is properly seised—are expected to comply with the Practice Direction’s guidelines.<sup>4</sup> Moreover, it is the Chamber’s job—not the job of the parties—to determine if it is properly seised or not. The ICP therefore requests that Ao An be required to file his response in a pleading that complies with the Practice Direction.
3. Ao An argues without merit that the ICP’s Appeal is not an appeal against a Trial Chamber (“TC”) decision that effectively terminates the proceedings.<sup>5</sup> The ICP’s Appeal

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<sup>1</sup> Letter from Ao An Defence Team to the Supreme Court Chamber Judges with the subject line “Response to International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2”, 14 May 2020 (“Ao An’s Letter”). Ao An’s Letter was emailed to the SCC Judges and Case 004/2 Parties in English on 14 May 2020 and in Khmer on 19 May 2020 (*see* Email from Kristin Rosella entitled “Ao An’s Letter to the President and other Judges of the Supreme Court Chamber”, 14 May 2020, 11:25 a.m. (attaching the English version of the letter); Email from Kristin Rosella entitled “Ao An’s Letter to the President and other Judges of the Supreme Court Chamber”, 19 May 2020, 10:24 a.m. (attaching the Khmer translation of the letter)). *See also* Practice Direction on Filing of Documents before the ECCC, ECCC/01/2007/Rev.8, amended on 7 March 2012 (“Practice Direction”), arts 8.4, 8.5; Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Internal Rules” or “Rules”), Rule 39(3). As five calendar days after notification of the Khmer translation fell on Sunday, 24 May 2020 and Monday, 25 May 2020 was a UNAKRT holiday (Eid-al-Fitr), the ICP files her reply on the first subsequent working day, Tuesday, 26 May 2020.

<sup>2</sup> **E004/2/1** International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 4 May 2020 (“ICP’s Appeal”), para. 77.

<sup>3</sup> Ao An’s Letter, p. 1.

<sup>4</sup> *See e.g.* **D251** Request for Submissions on Whether Im Chaem Should be Considered a “Senior Leader” or Among “Those who were Most Responsible”, 24 July 2015, EN 01120934 (noting arts 5.1 and 5.4 of the Practice Direction), para. 9 (setting the page limit for parties to follow in keeping with the Practice Direction when making their submissions); **D251/4** Im Chaem’s Observations on Whether She Should be Considered a “Senior Leader” or Among “Those who were Most Responsible”, 21 September 2015, paras 3, 8, 60; **D251/6** National Co-Prosecutor’s Observations Relating to CIJs’ Exercise of Discretion over the Case of Im Chaem Regarding D251, 21 September 2015, para. 13.

<sup>5</sup> Ao An’s Letter, pp. 2-3.

demonstrates that all of the *indicia* of an authoritative judicial act constituting a decision<sup>6</sup> were satisfied by the combination of (i) the TC’s inaction, (ii) the 3 April Statement making clear that the inaction would continue, and (iii) the physical return of the pleadings to the parties.<sup>7</sup> Together, these acts disposed of the legal matters before the TC in a definite matter, leaving no doubt that the TC would not exercise jurisdiction to engage with, let alone rule on, submissions in Case 004/2.<sup>8</sup> The TC’s return of the documents to the parties constituted the “operative part” of the decision, while the 3 April Statement provided a written summary of the Judges’ differing views and the reasons they would not act.<sup>9</sup> As Ao An himself noted, the TC Judges stated that they were providing the statement for “transparency and clarity”, another aspect of the required *indicia*.<sup>10</sup>

4. Contrary to Ao An’s representation of the ICP’s Appeal, the ICP is not impermissibly appealing the Considerations of the Pre-Trial Chamber (“PTC”).<sup>11</sup> Rather, she is asking the SCC to ensure that the administrative steps resulting from the PTC’s failure to reach a supermajority are carried out as required by law. As set out in the ICP’s Appeal, if the PTC does not overturn the Indictment by supermajority, the TC is seised of the case on the basis of the Indictment and the case should proceed to trial pursuant to Rules 77(13)(b), 79(1), 1(2), *lex specialis*, and the default principle enshrined in the ECCC Agreement and ECCC Law.<sup>12</sup> The ICP’s Appeal demonstrates that the PTC reached an impasse on the *administrative consequences* of its Considerations, which included the notification of its Considerations and the forwarding of the Case File to the TC.<sup>13</sup> It also shows that the TC would not resolve that impasse, which thereby effectively terminated the proceedings and prejudiced the Case 004/2 parties.<sup>14</sup> Despite Ao An’s assertion that “there are no remaining ‘legal impediments or practical obstacles’ or ‘possible gaps in legal proceedings’ that the SCC must remedy”,<sup>15</sup> his acknowledgement of “the current

<sup>6</sup> Case 002-E176/2/1/4 Decision on Nuon Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, 14 September 2012 (“Rule 35 Decision”), para. 25.

<sup>7</sup> E004/2/1 ICP’s Appeal, paras 41-44. *See also* E004/2/1.1.16 Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving Ao An, 3 April 2020 (“3 April Statement”), p. 2.

<sup>8</sup> *Contra* Ao An’s Letter, p. 3.

<sup>9</sup> Case 002-E176/2/1/4 Rule 35 Decision, para. 25; E004/2/1.1.16 3 April Statement, p. 2; *contra* Ao An’s Letter, p. 3.

<sup>10</sup> Case 002-E176/2/1/4 Rule 35 Decision, para. 25; Ao An’s Letter, p. 3.

<sup>11</sup> Ao An’s letter, pp. 2, 3, 5.

<sup>12</sup> E004/2/1 ICP’s Appeal, paras 50-57.

<sup>13</sup> E004/2/1 ICP’s Appeal, paras 15-18, 24-25.

<sup>14</sup> E004/2/1 ICP’s Appeal, paras 2-3, 12, 21-22, 27-30, 43-44, 48-49, 58-61, 67-68, 70-72, 75.

<sup>15</sup> Ao An’s letter, p. 4.

impasse”<sup>16</sup> clearly indicates his awareness of a deadlock that cannot be resolved without SCC intervention.

5. Much of Ao An’s letter challenges the ICP’s Appeal on the mistaken premise that the PTC Considerations terminated the proceedings on 19 December 2019.<sup>17</sup> In support of his premise, Ao An improperly argues that a simple majority view should take precedence over the supermajority rule and the default principle intrinsic to the legal framework of the ECCC.<sup>18</sup> He also misapprehends the correct application of the *in dubio pro reo* principle, which primarily relates to reasonable doubt *at trial* and does not apply to the question of legal interpretation at issue here.<sup>19</sup> Finally, his assertions misconstrue article 38 of the Cambodian Constitution.<sup>20</sup> The ICP has responded in detail on repeated occasion to all of these arguments and therefore incorporates those responses by reference.<sup>21</sup>
6. Ao An asserts that it is “telling” that the ICP “omits any mention” of Ao An’s request to the Co-Investigating Judges to seal and archive the Case File.<sup>22</sup> This assertion is wholly without merit, as the ICP did not know Ao An’s request existed until she was notified of it more than two hours after she had submitted the appeal.<sup>23</sup> Even if she *had* been aware of the request, it would have had no bearing on the ICP’s Appeal. In short, the request erroneously alleges that no provision covers the circumstances of the case and Rule 69(2)(b) should apply *mutatis mutandis*, ignoring Rule 77(13)(b) and the fundamental

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<sup>16</sup> Ao An’s letter, pp. 1, 4.

<sup>17</sup> Ao An’s letter, pp. 3, 4, 5, 7.

<sup>18</sup> Ao An’s letter, pp. 5, 6, 7.

<sup>19</sup> Ao An’s letter, p. 5.

<sup>20</sup> Ao An’s letter, p. 6.

<sup>21</sup> See e.g. **D359/28 & D360/37** International Co-Prosecutor’s Reply to Ao An’s Response to the ICP’s Request for all Required Administrative Actions to be Taken to Forward Case File 004/2 (Ao An) to the Trial Chamber, 3 March 2020, paras 4 (re. the majority argument), 6-8 (re. *in dubio pro reo*), 9 (re. art. 38 of the Cambodian Constitution); **D359/30 & D360/39** International Co-Prosecutor’s Response to Ao An’s Request for Confirmation that all Required Administrative Actions have been Taken to Archive Case File 004/2, 5 March 2020, paras 12-14 (re. the majority argument), 16 (re. *in dubio pro reo*); **D363/1** International Co-Prosecutor’s Response to Ao An’s Request to Seal and Archive Case File 004/2 (with Confidential Annexes A1-K2), 14 May 2020 (“ICP’s Response to the Seal and Archive Request”), paras 11-12 (re. the majority argument), 14-16 (re. *in dubio pro reo*), 17 (re. art. 38 of the Cambodian Constitution); **E004/2/1.2.26** International Co-Prosecutor’s Response to Ao An’s Summary of Preliminary Objections under IR 89(1), 23 March 2020, paras 12-15 (re. *in dubio pro reo*).

<sup>22</sup> Ao An’s letter, p. 6, *see also* p. 4.

<sup>23</sup> Notification Email from the Case File Officer, 4 May 2020, 1:22 p.m. (notifying **D363** [Ao An’s] Request to Seal and Archive Case File 004/02); **E004/2/1** ICP’s Appeal, cover page (noting that the appeal was filed on 4 May 2020 at 11:00 a.m.).



and determinative default position which dictate the consequences that must follow when no supermajority overturns the Indictment.<sup>24</sup>

7. Finally, Ao An attempts to distract the SCC from the central issues of the ICP's Appeal by repeatedly painting her references to judicial and ethical obligations in a bad light, referring to them as "insinuations" that the TC lacked judicial independence and impartiality.<sup>25</sup> To be clear, the ICP's Appeal is based on the TC's failure to carry out its judicial duties in accord with the legal framework of the ECCC, which required it to honour the fundamental and determinative default position that seised the TC of Case 004/2. This failure was manifested in the TC's lack of action to progress the case and its 3 April Statement and physical return of the parties' pleadings, which underscored the Chamber's refusal to pronounce on the justiciable issues before it. The ICP's Appeal is based on law, not innuendo, despite Ao An's obvious attempt to categorise it otherwise.

### III. RELIEF REQUESTED

8. For all the foregoing reasons, the ICP requests that the SCC:
- (i) Dismiss the arguments contained in Ao An's letter on the grounds that they are without merit,
  - (ii) Order Ao An to file the response contained in his letter in a pleading that complies with the Practice Direction, and
  - (iii) Grant the relief requested in the ICP's Appeal.<sup>26</sup>

Respectfully submitted,

Date	Name	Place	Signature
26 May 2020	Brenda J. HOLLIS International Co-Prosecutor	Phnom Penh 	

<sup>24</sup> See Ao An's letter, p. 6; **D363/1** ICP's Response to the Seal and Archive Request, para. 11.

<sup>25</sup> Ao An's letter, pp. 1, 4, 6.

<sup>26</sup> **E004/2/1** ICP's Appeal, para. 77.